Supreme Court, U.S.
FILED
FEB 22 2002

No. 01-1068

In The

Supreme Court of the United States

JAMES HENDERSON,

Petitioner,

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner is an unnamed class member in a federal class action. He wished to raise an objection to a portion of a proposed settlement and moved to intervene in the district court. After his motion to intervene was denied and his objection overruled, petitioner appealed, challenging only the ruling on the objection, thereby waiving all issues related to intervention. The question presented is:

> Whether an unnamed class member who waives all issues on appeal related to intervention should now have his petition granted on intervention issues solely because the Court has granted review in another case?

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I. INTRODUCTION

Petitioner James Henderson is an unnamed class member who objected to a portion of a class action settlement despite the fact that he was in no way affected by that aspect of the settlement. Henderson also attempted to gain party status by a motion to intervene filed in the Eastern District of Missouri. The district court denied Henderson's motion to intervene and overruled his objection to the settlement. On appeal to the Court of Appeals for the Eighth Circuit, Petitioner devoted the entirety of his four-page argument (devoid of citations to authority) to the order overruling his objection to the settlement. Henderson did ***not*** challenge the order denying intervention or otherwise contend the district court erred in denying him party status.

As the Eighth Circuit held, Henderson "neglects to identify the intervention question as an issue in his Statement of Issues, and he does not even mention the word 'intervene' in his brief. By failing to raise the intervention issue, Henderson has waived the issue and effectively conceded his non-party status." A9-10.[1] Because Henderson had not raised the issue, the Eighth Circuit did not address the denial of intervention or the controlling precedent requiring intervention by non-parties to appeal approval of a class action settlement – the very issue on which Petitioner now seeks review.

Plenary review is rarely granted on an issue that was neither pressed nor passed upon below. *Yee v. City of*

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[1] "A___" refers to Appendix to Petition for Writ Certiorari.

Escondido, 503 U.S. 519, 533 (1992). Recognizing this, Henderson asks the Court to "hold" his petition pending the Court's resolution of *Devlin v. Scardelletti*, No. 01-417, granted review on December 10, 2001. However, a "hold" is not appropriate under the circumstances of this case. The rationale for holding a petition pending the disposition of another case is that review should not be denied simply because the earlier petition was the first to raise the same issue. Here, had Petitioner filed first, certiorari would have been denied as the question presented was neither raised nor passed upon below. Moreover, the balance of equities weighs against holding this petition. Petitioner's objection is to a portion of the settlement that does not affect him. Yet, by this petition, he is holding up cash settlement payments to over 3,400 class members.

II. STATEMENT OF THE CASE

This case involves three nationwide class actions filed against respondent General American Life Insurance Company ("General American") and consolidated by the Judicial Panel for Multi District Litigation in 1997 for pretrial proceedings in the Eastern District of Missouri. The actions allege that General American manipulated dividends, interest crediting rates and other actuarial factors, enabling it to misrepresent the performance and characteristics of the life insurance policies purchased by class members. As a result of the misrepresentations, class members bought policies that General American knew would not perform as promised. Consequently, the class lost millions of dollars in premium payments, policy values and sometimes their life insurance coverage.

After two and one-half years of litigation and almost two years of settlement negotiations, the parties reached a settlement. Under the terms of the settlement, class members have a choice between two broad forms of relief, either automatic General Policy Relief ("GPR") or participation in the Claim Evaluation Process ("CEP"). A24. The CEP is a cost-free, simple process for class members to resolve complaints relating to their insurance policies. Claims are reviewed and scored by a third-party Claim Evaluator selected and trained by plaintiffs' lead counsel. A20. Nearly all CEP participants receive a cash payment, often in the thousands or tens of thousands of dollars. In addition to GPR and CEP, the settlement provides "Prospective Performance Undertaking" relief, whereby General American is prohibited from lowering below negotiated levels its policies' dividend scales and interest crediting rates for a period of four years after the final settlement date. Petitioner chose GPR and, unlike those who chose CEP, is receiving his settlement benefits despite the delay in the judgment becoming final as a result of his petition.

On the last possible day to object, Petitioner filed an objection to the settlement claiming that because of one aspect of CEP scoring, the entire settlement was fundamentally unfair. Petitioner himself is unaffected by the scoring since he chose GPR. CR 165, 166, 170.[2] On the same day, Petitioner also moved to intervene and obtain party status pursuant to Fed. R. Civ. P. 24(a). In opposition, Respondents argued, among other things, that Petitioner was represented by a group of lawyers whose

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[2] "CR___" refers to the district court docket.

practice largely consists of filing last minute, frivolous objections to class action settlements, then seeking fees to withdraw the objections. Their strategy, which they have employed time and again, is to file objections to the settlement on the last day permitted, move to intervene, request that discovery be reopened and then make demands designed to delay implementation of the settlement so that the parties will ultimately be forced to pay them.[3] In this case, the parties refused Petitioner's demands, trusting that the district court would overrule the meritless objection and deny party status to a class member seeking to improperly advance his individual interests at the expense of other class members.

After a full hearing at which Petitioner's counsel attended and participated, the district court approved the

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[3] Petitioner's counsel have filed substantially similar objections and intervention briefs for the purpose of holding up settlements in numerous cases, including: *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000); *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, MDL No. 1105 (REK), Master Docket No. 1:96-11534-REK (D. Mass. C.A. Oct. 3, 2000); *McNeil v. American General Life & Accident*, Case No. 3:99-1157 (M.D. Tenn. Sept. 8, 2000); *Jordan v. State Farm Life Ins. Co.*, Case No. 97 CH 11 (McLean County, Ill. March 26, 1999); *Garst v. Franklin Life Ins. Co.*, Case No. 97-N-0074-S (N.D. Ala.); *Lee v. USLife Corp.*, Case No. 1:97-CV-55-M (W.D. Ky.); *Manners v. American General Life Ins. Co.*, No. 3-98-0266 (M.D. Tenn.); *Moody v. American General Life and Accident Co.*, Case No. CI0199701525 (C.P. Lucas County, Ohio); *In re Metropolitan Life Ins. Co. Sales Practices Litig.*, MDL No. 1091, Master Docket No. 96-179 (W.D. Pa. July 26, 2000); *Sternberg v. Apple Computer, Inc.*, Case No. CV788574 (Super. Ct. Santa Clara County, Cal.); *Gordon v. Apple Computer, Inc.*, Case No. CV790452 (Super. Ct. Santa Clara County, Cal.).

settlement, denied Petitioner's motion to intervene and overruled his objection to the settlement. A18, 28. Approving the settlement, the district court determined that the minimum value of the settlement was $55 million ($21 million in the CEP fund; $34 million in General Policy Relief). A20. This value does not include attorneys' fees and expenses (which were paid separately by General American), nor does this amount include the value of the Prospective Performance Undertaking.

Petitioner then appealed to the Court of Appeals for the Eighth Circuit, delaying implementation of the settlement pending resolution of the appeal. Petitioner posted no bond. On appeal, Petitioner did not contest the denial of intervention. Instead, his four-page appeal was devoted entirely to arguing his objection to the settlement. He cited no legal authority other than one case on the standard of appellate review. By motion to the court, Henderson waived oral argument on his appeal and did not attend the appellate court hearing.

The Eighth Circuit ruled that by failing to contest or to even mention intervention, Petitioner had waived the issue, was not a party to the proceedings and therefore lacked standing to appeal. The appeals court did not consider or pass upon the propriety of the Eighth Circuit precedent requiring successful intervention to have standing to appeal. A8-11. Nonetheless, Petitioner now asks the Court to review precisely that issue even though it was not addressed.

III. REASONS FOR DENYING THE PETITION

On December 10, 2001, the Court granted certiorari in *Devlin v. Scardelletti*, No. 01-417. Argument is set for March 26, 2002. The question presented in *Devlin* is whether an unnamed class member, whose petition to intervene was denied, has standing to appeal the district court's approval of the settlement. *See Devlin*, Petition for Writ of Certiorari. Here, Petitioner asks the Court to hold his petition pending decision in *Devlin*, or in the alternative to grant plenary review.

Henderson's petition should not be held pending the disposition of *Devlin*. One reason for holding a petition pending decision of a similar case is that "like cases must be treated alike." *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1986) (Brennan/Marshall, J.J. dissenting). The rationale is that "whether an individual obtains relief should not turn on the fortuity of whether his papers were the first, the second or the tenth to reach the Court. What counts is the merits." *Id.*

Here, the cases are not alike because Petitioner would not be granted review on the merits. Henderson waived the issue for which he now seeks review. And, unlike the lower courts in *Devlin*, here neither the Eighth Circuit nor the district court considered the question presented, so there is no record in this case that can contribute to resolution of the issue. Therefore, whether Henderson obtains relief does not depend on the fortuity of when his petition was filed. Rather, Henderson simply clings to the coattails of *Devlin* to evade his prior waiver.

Holding this petition will also substantially prejudice class members still waiting for their settlement relief.

Pursuant to the terms of the settlement, implementation of all settlement relief to all class members was deferred while Petitioner appealed to the Eighth Circuit. Petitioner posted no bond to appeal. Upon dismissal of the appeal, the parties began implementing certain aspects of the settlement. General Policy Relief (GPR) is being paid and all CEP claims have been submitted to the Claim Evaluator, who has started the review and scoring procedure. However, the settlement does not permit any CEP payments to be made until the judgment becomes final. If this petition is held, Henderson will have effectively stayed implementation of the CEP payments pending the Court's resolution of an issue in another case, that Petitioner did not consider important enough to raise himself in the lower courts. Meanwhile, over 3,400 class members must await their relief (typically thousands of dollars) while most must continue to pay their policy premiums out-of-pocket, or face losing their life insurance coverage. Such a stay will have no negative effect on Henderson, as he did not choose to seek CEP relief, but instead chose to receive GPR benefits. CR 165, 166, 170.

Nor should Henderson's petition be granted plenary review. The question presented by Henderson, similar to *Devlin*, is whether an unnamed class member has standing to appeal approval of a class action settlement even though his motion to intervene was denied. P.(i). Henderson did not present this issue to either the district court or the Eighth Circuit. It is undisputed that Henderson did not challenge the order denying intervention, neglecting "to identify the intervention question as an issue in his Statement of Issues, and he does not even mention the word 'intervene' in his brief." A9-10.

In his reply brief to the Eighth Circuit, Petitioner asserted that he did challenge denial of intervention by designating the district court's order in his notice of appeal. The Eighth Circuit rejected this theory because (i) issues not argued in an opening brief cannot be raised for the first time in reply, and (ii) designating a court order in a notice of appeal, without more, is insufficient to raise the issue. A10.

Were the Court to grant plenary review, it would be reviewing an issue not presented below, not briefed below, not argued below and not determined below. Traditionally, the Court has declined to do this. *United States v. Williams*, 504 U.S. 36, 58 (1992) (traditional rule precludes a grant of certiorari if question presented was not pressed or passed upon below); *Yee*, 503 U.S. at 538 ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.").

IV. CONCLUSION

For the reasons given, the petition for writ of certiorari should be denied.

February 22, 2002

Respectfully submitted,

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